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IN THE SUPREME COURT OF THE UNITED STATES

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JUAN SMITH, :

Petitioner :

v. : No. 10-8145

BURL CAIN, WARDEN :

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Washington, D.C.

Tuesday, November 8, 2011

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:11 a.m.

APPEARANCES:

KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on
behalf of Petitioner.

DONNA R. ANDRIEU, ESQ., Assistant District Attorney, New
Orleans, Louisiana; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next this morning in Case 10-8145, Smith v. Cain.

5 Mr. Shanmugam.

6 ORAL ARGUMENT OF KANNON K. SHANMUGAM

7 ON BEHALF OF THE PETITIONER

8 MR. SHANMUGAM: Thank you, Mr. Chief
9 Justice, and may it please the Court:

10 In Brady v. Maryland, this Court established
11 the now-familiar principle that the prosecution must
12 hand over all favorable material evidence to the defense
13 before trial. This case presents a flagrant violation
14 of that principle.

15 The Orleans Parish district attorney's
16 office produced almost no relevant evidence to the
17 defense before Petitioner's trial, and Petitioner was
18 convicted of first degree murder based solely on the
19 testimony of a single eyewitness. Unbeknownst to the
20 defense, however, that eyewitness had told the police on
21 multiple occasions that he could not identify any of the
22 perpetrators or, as he put it, that he would not know
23 them if he saw them.

24 The suppression of those statements alone
25 justifies a new trial, but the district attorney's

1 office in this case also engaged in the wholesale
2 suppression of statements of numerous other witnesses,
3 statements that further undermined the sole eyewitness
4 identification of Petitioner and, more broadly, cast
5 doubt on Petitioner's involvement and role in the
6 shooting.

7 If all of that information had been
8 disclosed to the defense before trial, the jury surely
9 would have viewed this case in a completely different
10 light. The trial court therefore erred by rejecting
11 Petitioner's Brady claim, and its judgment should be
12 reversed.

13 In our view, in order to conclude that
14 Petitioner is entitled to a new trial here, this Court
15 need do nothing more than to consider the suppressed
16 statements of the key eyewitness, Larry Boatner.
17 Respondent concedes that those statements were withheld
18 from the defense before trial, and argues only that the
19 failure to disclose those statements was not
20 prejudicial.

21 Those statements, however, could not have
22 more clearly contradicted Boatner's confident
23 identification of Petitioner at trial --

24 JUSTICE GINSBURG: Wasn't there a picture?
25 Boatner saw a picture in the newspaper and that turned

1 on the light for him; right? It wasn't any police
2 suggestion?

3 MR. SHANMUGAM: That is correct. The basis
4 for Boatner's identification was that he saw a
5 photograph in the New Orleans newspaper of Petitioner.
6 It was in connection with an article describing the
7 shootings and suggesting that Petitioner was one of the
8 suspects in the case. And that was what led to his
9 prior identification out of court.

10 But just to be clear, Justice Ginsburg, we
11 are not arguing today that the identification was
12 somehow constitutionally problematic. At most, we are
13 arguing that the identification was of questionable
14 validity in light of the fact that Boatner had only a
15 limited opportunity to see the perpetrators and in light
16 of the circumstances that led to his identification.

17 Now, even if his identification were more
18 clearly reliable, our argument today would be the same.
19 In a case such as this one, in which the sole basis for
20 linking the defendant to the crime is the testimony of a
21 single eyewitness, and there is evidence that the single
22 eyewitness said on multiple occasions that he couldn't
23 identify anyone, we believe that, absent extraordinary
24 circumstances, that will be sufficient to --

25 JUSTICE ALITO: Well, aren't you

1 exaggerating a little bit about the value of the
2 impeachment evidence regarding Boatner? My
3 understanding is that he made his first statement to the
4 effect that he couldn't identify anybody at the scene,
5 when he had been at the scene where five people that he
6 knew very well had been killed.

7 He was lying on the floor with a big gash on
8 his head. He was questioned at the scene, and at that
9 time -- this was in the evening -- he said: I can't
10 identify anybody. But then later that very day, wasn't
11 it? That very evening, after midnight, he was
12 questioned at the police station. Am I correct.

13 MR. SHANMUGAM: Yes. That's correct.

14 JUSTICE ALITO: And at that point he gave a
15 description. He did make an -- he did provide a
16 description of the person that he said was the one who
17 first came through the door. So, you know, that -- I
18 don't know -- and then later, he said he -- there were
19 statements to the effect that he couldn't identify
20 anybody.

21 But in light of the fact that he did provide
22 a pretty, you know, somewhat detailed description on the
23 very evening of the event, doesn't that -- aren't you
24 exaggerating when you say that he said numerous times --
25 the effect of these statements that he couldn't --

1 MR. SHANMUGAM: Justice Alito, it is true
2 that Boatner provided identifying details in the later
3 statement that night. I would respectfully submit that
4 they were relatively limited identifying details, simply
5 the fact that the first man through the door had a low
6 cut haircut and gold teeth. And as we indicate in our
7 brief, those were characteristics shared by numerous
8 other suspects in the case.

9 But I think more broadly, with regard to
10 both sets of statements at issue here, the State's
11 explanations for those statements are at best plausible.
12 And we really think that in a case such as this one, in
13 which the evidence on its face is so clearly of high
14 exculpatory or impeaching values, it takes something
15 more than that. It is not sufficient for Respondent to
16 argue here simply that, even taking into account these
17 statements, a rational juror could still reach the same
18 result and return a verdict of guilty here.

19 Because this Court made clear in *Kyles v.*
20 Whitley that the standard for Brady claims is not a
21 *Jackson v. Virginia* type sufficiency of the evidence
22 standard. So again, where you have statements on their
23 face are not simply statements calling a witness'
24 credibility into question, but statements that really
25 directly contradict the confident in-court

1 identification, it would take an exceedingly persuasive
2 explanation for those statements to defeat a showing of
3 materiality.

4 JUSTICE KENNEDY: The standard is a
5 reasonable probability that the result would have been
6 different, reasonable probability?

7 MR. SHANMUGAM: Yes, that's correct. And
8 this Court made clear in *Kyles v. Whitley* that that's
9 not a more likely than not standard. That is
10 essentially the same standard that this Court has
11 articulated for prejudice for ineffective assistance of
12 counsel claims, under *Strickland v. Washington*, and by
13 now it's a quite clearly established standard. And
14 again it requires something less than a showing of more
15 likely than not and perhaps something slightly more than
16 the showing required for harmless error under *Chapman v.*
17 *California*.

18 But I do want to touch upon the State's
19 explanations for these statements and explain very
20 briefly why we think that those explanations are frankly
21 not even plausible. With regard to the first statement
22 to which Justice Alito referred, the statement that was
23 made at the scene approximately half an hour after
24 initial -- officers initially responded to the scene.
25 The State's argument is that Boatner was somehow too

1 traumatized to make an identification at the time.

2 But not only did Boatner not so testify at
3 the post-conviction hearing -- in fact he testified that
4 he couldn't recall the statement at all -- but the very
5 officer who took the statement himself testified at
6 trial in this case that at the time of the statement
7 Boatner was, quote, "coherent and articulated very well
8 the events that transpired." And that is at pages 137
9 to 138 of the joint appendix.

10 JUSTICE ALITO: That may be true, but if you
11 were a juror and Boatner testified and he was
12 cross-examined and they attempted to impeach him based
13 on his failure to make an identification right at the
14 scene and he said, well, that was because five of my
15 friends had just been killed and I was lying on the
16 floor and I thought I was going to be shot too and I had
17 a big gash on my head, and then a couple of hours later
18 when I collected myself and they asked me the same
19 question at the police station I provided a description
20 and didn't say I couldn't identify anybody, do you think
21 jurors would just dismiss that and say, well, he
22 couldn't identified him at the scene so he must have
23 been lying when he identified -- when he provided a
24 description later at the police station?

25 MR. SHANMUGAM: Justice Alito, I think that

1 it's possible that a juror could credit that explanation
2 in any retrial, though --

3 JUSTICE GINSBURG: Wasn't there -- wasn't
4 there an intervening -- didn't he say 5 days after that
5 he couldn't identify? And that was after what he said
6 on the night, the same night. 5 days later he said: I
7 couldn't -- I couldn't identify him.

8 MR. SHANMUGAM: That is correct, Justice
9 Ginsburg. But even if we didn't have the March 6th
10 statement or statements, I would frankly be happy to
11 take my chances with the jury, even with regard solely
12 to the March 1st statement, in light of that testimony
13 of Officer Ronquillo that Boatner was in fact coherent,
14 articulated very well the events that transpired just
15 like any witness, and so on and so forth.

16 So again -- -

17 JUSTICE SOTOMAYOR: Counselor --

18 MR. SHANMUGAM: -- we don't think that it's
19 our burden to show that no juror could credit the
20 State's explanation. It's simply that we think that
21 that explanation doesn't hold water.

22 JUSTICE SOTOMAYOR: Counselor, your argument
23 now and in your brief suggests that you're relying most
24 heavily on the failure to provide the impeachment
25 materials of the only witness to this crime and the only

1 piece of evidence that ties your client to the crime.

2 But you also mention other things, and Respondents spend
3 90 percent of their brief arguing against the other
4 things. But I just want to clarify those other things.

5 Number one, was the testimony mixed
6 testimony about whether the assailants wore a mask
7 across their face or over their entire head?

8 MR. SHANMUGAM: There were --

9 JUSTICE SOTOMAYOR: What's the best take on
10 what the evidence showed that was presented on that
11 issue?

12 MR. SHANMUGAM: There was some degree of
13 variation in what the witnesses said. Now, in the main
14 we are talking again about statements that were
15 withheld. And I want to lay out those statements very
16 briefly if I may. There were two eyewitnesses who made
17 statements to the police indicating that some or all of
18 the perpetrators, including the first man through the
19 door, were wearing masks. Those were the statements of
20 Shaelita Russel and the statement of Dale Mims.

21 Now, with regard to the statement of
22 Shaelita Russell -- and this was what we believe was the
23 dying declaration that she made at the scene in the
24 immediate aftermath of having been shot multiple
25 times -- Russell said she saw people barge into the

1 kitchen, one had a black cloth across the face, first
2 one through the door. So it is at least theoretically
3 possible --

4 JUSTICE SOTOMAYOR: Could I ask you
5 something? Who determines that issue of whether that's
6 a dying declaration? Do we determine that in deciding
7 whether the withholding of the Brady materials was
8 harmful or not? Do we give deference to the lower
9 court's determination of that? Do they have to decide
10 whether it was a dying declaration. What's the standard
11 on something like this?

12 MR. SHANMUGAM: The lower court did not make
13 such a determination in this case on this or any of the
14 other evidentiary issues that Respondent now advances,
15 at least in part, because it does not appear that
16 Respondent advanced any of those arguments below. But I
17 think more broadly, Justice Sotomayor, in terms of the
18 role of this Court or any other court considering a
19 Brady claim, this Court hasn't quite spoken to the
20 specific issue of whether a Brady court is supposed to
21 itself make an evidentiary determination where there is
22 a question about admissibility, but the closest that
23 this Court came was in Wood v. Bartholomew, in which
24 this Court indicated that with regard to Brady material,
25 it either has to itself be admissible or be reasonably

1 likely to lead to admissible evidence. And the Court's
2 reasoning in Wood v. Bartholomew was somewhat spare on
3 that score. That was a summary reversal and a per
4 curiam opinion.

5 But I do think that it would be appropriate
6 for a Brady court to make that determination itself or
7 at a minimum make a determination as to whether it
8 appears that it's reasonably likely that the evidence
9 would be admissible.

10 Here we really don't think that it's a close
11 question, particularly with regard to the statement of
12 Shaelita Russell, because the context of the handwritten
13 notes makes clear that the statement was taken at the
14 scene of the crime. Shaelita Russell was taken to the
15 hospital approximately a half an hour after the
16 shootings occurred. She told two witnesses that she
17 believed that she was dying and so under the law on
18 dying declarations -- and I have no reason to believe
19 that the law is any different in Louisiana from the
20 Federal system or the 49 other States -- that would
21 comfortably satisfy that requirement.

22 JUSTICE SOTOMAYOR: Now, Mr. Mims was the
23 neighbor who saw the two -- there were three assailants
24 in total, right, and two left the scene?

25 MR. SHANMUGAM: There is some doubt as to

1 whether or not there were three or four assailants. And
2 Mims himself, in all candor, was a little bit
3 inconsistent on that point. But he consistently said
4 both in the handwritten notes and in his testimony at
5 the post-conviction hearing that all of the assailants,
6 however many there were, were wearing masks and that he
7 saw them as they were getting into the car. He didn't
8 say anything further other than that the masks were
9 ski-type masks.

10 But the State's argument with regard to the
11 materiality of Mims's statement is that it is possible
12 that the men would not have been wearing masks when they
13 entered the house to allegedly commit the armed robbery
14 and therefore the fact that Boatner saw the first man
15 unmasked can be reconciled with his statement. And
16 again, we would be happy to take our chances with the
17 jury and make the argument that that would be an
18 exceedingly unconventional way to go about committing an
19 armed robbery.

20 And again with regard to the Russell and
21 Mims statements, I think it's important to remember that
22 we view those statements as going directly to and
23 contradicting Boatner's in-court identification. And so
24 in some sense we view those statements as being of a
25 piece with Boatner's own prior statements in which he

1 indicated that he could not identify anyone and that he
2 would not --

3 JUSTICE ALITO: Does the defense have any
4 theory as to why Boatner would lie about whether he
5 could identify this individual?

6 MR. SHANMUGAM: First of all, Justice Alito,
7 it would of course not be the defense's burden in any
8 subsequent retrial to come up with a theory of its own.
9 The defense could simply argue, as it did at the first
10 trial, that the prosecution simply didn't bear its
11 burden on reasonable doubt.

12 JUSTICE ALITO: Yes, but -- but the impact
13 of your impeachment evidence would be related certainly
14 to if a juror would ask: Well, why would he lie about
15 this? And I'm -- I'm just asking, did the defense have
16 any theory about what his motive would be about whether
17 he could identify somebody, whether this first person
18 had a mask or not.

19 MR. SHANMUGAM: As this Court will be aware
20 from its recent consideration of eyewitness evidence, it
21 doesn't necessarily follow from the fact that an
22 eyewitness identification is mistaken that the
23 eyewitness was somehow lying about it. It may very well
24 have been that Boatner made a mistaken identification in
25 good faith out of a desire to identify the person who

1 killed several of his friends.

2 And indeed, as the amicus brief of the
3 Innocence Project explains in this case, there is a
4 phenomenon known as mug shot exposure effect, where an
5 individual who sees a mug shot in some other context is
6 more likely to identify that same person when confronted
7 with a subsequent line-up. Of course, where, as here,
8 the individual is exposed to the mug shot for the first
9 time in seeing a newspaper article that depicts the
10 individual in question and suggests that that individual
11 is a suspect in the crime, it would not at all be
12 unusual for the individual when confronted with that
13 photograph again in a line-up a few weeks later to pick
14 that individual out.

15 JUSTICE ALITO: But the first time he -- he
16 said that the person wasn't masked and provided a
17 description was long before he saw any mug shots. It
18 was the evening of the event. It was when he was
19 questioned at the police station.

20 MR. SHANMUGAM: Well, on the evening of the
21 event he provided those limited details about the gold
22 teeth and the low-cut haircut.

23 JUSTICE ALITO: Yes, but by doing that he's
24 saying this person wasn't wearing a mask. That's the
25 critical point.

1 MR. SHANMUGAM: Well, that may suggest that
2 the person was not wearing a mask. Of course, it's
3 possible that the person somehow had part of his face
4 covered.

5 But I think it's important to realize,
6 Justice Alito, that even with regard to that statement,
7 while it is true that Boatner provided those limiting
8 details, he also made statements suggesting that he was
9 not confident of his ability to actually make an
10 identification. And in that statement, which is found
11 at page 296 of the joint appendix, he says: "I was too
12 scared to look at anybody. I wish I could give y'all a
13 description."

14 So in some sense we think that the focus on
15 the gold teeth and the low-cut haircut in this case is a
16 bit of an aside, because the question here is not
17 whether he saw enough to support the subsequent
18 identification. The question is whether his suppressed
19 statements in which he repeatedly said, I can't make an
20 identification, contradict his in-court confident
21 identification of Petitioner.

22 And we think that in order to decide this
23 case, all that the Court essentially need say in an
24 opinion is that in a case such as this one, in which all
25 you have is the identification of a single eyewitness,

1 where you have statements in which that eyewitness said,
2 I can't make an identification, and those statements
3 have concededly been suppressed, the Brady materiality
4 threshold is satisfied.

5 JUSTICE SOTOMAYOR: Am I right that this --

6 JUSTICE KENNEDY: In looking at the
7 appendix, there are some asterisks. Were these
8 statements, the first two -- the one at 252 in the joint
9 appendix and then the statement on March 2nd, which is
10 the one you just referred to, 296, were parts of those
11 statements given to the defense counsel or none of the
12 statements? And how long were the documents? Were they
13 20 or 30 pages? Can you tell me a little bit about
14 that?

15 MR. SHANMUGAM: First of all, none of those
16 statements were given to the defense. The only
17 relevant --

18 JUSTICE KENNEDY: I shouldn't have said
19 statements. None of the reports.

20 MR. SHANMUGAM: Yes. None of the statements
21 or the surrounding materials was given to the defense at
22 all. The only even remotely relevant thing that was
23 given to the defense was the initial police report,
24 which was a five-page document prepared by the officers
25 who initially responded to the scene, with a one-page

1 narrative of what took place. And that document, for
2 the Court's reference, is in volume 10 of the initial
3 record that was received from the district court at
4 pages R1907 to 1911.

5 Now, with regard to these specific
6 statements, both the narrative statements and the
7 handwritten notes, the narrative statements were
8 contained in a relatively voluminous document, I believe
9 it was an 83-page document, that was a narrative
10 prepared by Officer Ronquillo that set out everything
11 that took place over the course of the investigation.
12 And none of that was disclosed. Respondent makes the
13 argument that the trial court reviewed that document in
14 camera, but we think that it is somewhat unclear what,
15 if anything, the trial court actually reviewed in
16 camera. There is no dispute that that document was not
17 handed over to the defense.

18 With regard to the handwritten notes, there
19 actually are a relatively small number of relevant
20 handwritten notes in this case, but all of them were
21 contained in the police files and none of them, none of
22 the ones at issue on which we are relying, was handed
23 over before trial.

24 So this is not a case in which selective
25 materials were handed over. None of this material was

1 handed over, and that's why we really think that this is
2 a case that involves the categorical withholding of
3 documents and not simply the withholding of selected
4 documents that may subsequently turn out to be relevant.

5 JUSTICE KENNEDY: Can you just tell me, how
6 does Brady work? Is there some obligation for the
7 defense counsel to say: Please give me all relevant
8 reports?

9 MR. SHANMUGAM: No. This Court has made
10 clear that a request is unnecessary to trigger the Brady
11 obligation, and this Court has made clear in cases
12 dating back to Brady itself that the good faith or bad
13 faith of the prosecutor is irrelevant. And, of course,
14 the prosecutor has a duty under Brady to hand over not
15 only materials in the prosecutor's own possession, but
16 also materials in the possession of the police as well.

17 JUSTICE SOTOMAYOR: Counsel, is -- this
18 group or gang, all of them had gold teeth and faded hair
19 cuts?

20 MR. SHANMUGAM: There were five other
21 suspects who had gold teeth or -- and low-cut hair cuts.
22 Three of the other individuals who were primarily in the
23 frame for this murder had those characteristics. I
24 believe that the three were Banister, Phillips and
25 Young. The only other suspect who is a reasonably

1 likely suspect who didn't was Robert Trackling, the
2 suspect whose confession to involvement in these
3 shootings was withheld.

4 JUSTICE SOTOMAYOR: In short, faded hair
5 cuts and gold teeth were not a unique characteristic.

6 MR. SHANMUGAM: They were not uncommon in
7 the 1990s.

8 JUSTICE SCALIA: What were these --
9 (Laughter.)

10 JUSTICE SCALIA: They are uncommon to me.
11 {Laughter.}

12 JUSTICE SCALIA: These -- these were not
13 gold teeth that were implanted, right? Was it some kind
14 of a mouthpiece of gold?

15 MR. SHANMUGAM: I have to admit that my
16 familiarity with this practice is perhaps not that much
17 greater than yours, Justice Scalia. But my
18 understanding is --

19 JUSTICE SCALIA: I'm sorry to hear that.

20 MR. SHANMUGAM: My understanding is that
21 these are gold teeth that are worn either as temporary
22 or perhaps semi-permanent implants, and that in hip-hop
23 culture in the 1990s this was relatively common.

24 But whatever the provenance of this
25 practice, it is undisputed on this record that multiple

1 other suspects had those characteristics.

2 Justice Sotomayor, there was one thing you
3 asked that I just want to get back to with regard to the
4 remaining categories of evidence. I just want to set
5 them out and then I'd be happy to answer any questions
6 that the Court has about them. And if there are no
7 further questions, I'll reserve the balance of my time.

8 As we explained in our brief, there are
9 three other categories of evidence at issue here. There
10 was the statement of Phillip Young, Petitioner's
11 co-defendant, suggesting that Petitioner was not
12 involved in the shootings. There were also the
13 statements that would have called into question the
14 prosecution's theory that Petitioner was one of the
15 shooters, a theory that was essential to establishing
16 the intent required for first degree murder under
17 Louisiana law. Louisiana is somewhat different from
18 other States in that it doesn't require a premeditation,
19 but that it -- but it does require a specific intent to
20 kill or inflict great bodily harm.

21 JUSTICE ALITO: Well, on that point, the
22 State says that you're drawing a meaningless distinction
23 between a hand -- a 9-millimeter handgun and a
24 9-millimeter automatic pistol.

25 MR. SHANMUGAM: Well, we don't think that

1 that's a meaningless distinction, and we cite numerous
2 sources in our brief that draw precisely that
3 distinction.

4 But I think that what's noteworthy with
5 regard to the statements at issue is that both Boatner,
6 who identified the weapon that the perpetrator whom he
7 believed to be the Petitioner was carrying, and the
8 State's ballistics expert, Kenneth Leary, who identified
9 the weapon that was responsible for the firing of the
10 casings at issue, conspicuously failed to say that the
11 weapon at issue was a 9- millimeter handgun. But at
12 trial their testimonies suddenly converged and Boatner,
13 who had previously said only that the perpetrator was
14 carrying a handgun, said that the perpetrator was
15 carrying a 9- millimeter handgun; and Leary, who said
16 that the casings at issue had come from a machine pistol
17 of the Intratec or MAC-11 type, suddenly said that they
18 came from a 9-millimeter handgun instead.

19 And so at a minimum, if the defense had
20 possessed those statements, it could have sown doubt on
21 whether the firearm was in fact one and the same and,
22 therefore, sown doubt on a critical element of the
23 offense at issue.

24 And finally, the only other category --

25 JUSTICE SOTOMAYOR: I'd just like to go back

1 to that because I'm not sure that I understand the
2 argument. Both the ballistics expert at trial said that
3 the casings were consistent with a 9-millimeter, and I
4 know that Boatner said that it was a 9-millimeter that
5 was used, and the issue was whether anybody would call a
6 MAC gun a handgun as opposed to an automatic pistol,
7 correct?

8 MR. SHANMUGAM: Well, that's right with
9 regard to Leary's testimony. I think the thing that was
10 a little bit odd with regard to Boatner's testimony was
11 the sudden degree of specificity. Having said only that
12 it was a handgun or a chrome automatic in his prior
13 statements, he said at trial that it was a 9-millimeter
14 handgun, which he had not previously said in the
15 statements that were withheld.

16 And, finally, the last category of evidence
17 consists of the notes of the interview in which Eric
18 Rogers relayed Robert Trackling's confession to
19 involvement in the shootings. As the amicus brief of
20 the NACDL points out, courts have routinely held that
21 confessions by other perpetrators constitute exculpatory
22 evidence, even with regard to offenses that may have had
23 multiple perpetrators. And we certainly believe that at
24 a minimum the suppression of those notes, when
25 considered in conjunction with all the other evidence,

1 comfortably satisfies the Brady materiality standard,
2 and it's for that reason that we think that the judgment
3 of the trial court should be reversed.

4 JUSTICE KAGAN: Mr. Shanmugam, just a quick
5 one. Was -- is all the evidence that you're discussing
6 here today, was that presented to the State
7 post-conviction court?

8 MR. SHANMUGAM: Yes. We believe that all of
9 this evidence was before the State post-conviction
10 court.

11 Thank you, and I'll reserve the balance of
12 my time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Ms. Andrieu.

15 ORAL ARGUMENT OF DONNA R. ANDRIEU

16 ON BEHALF OF THE RESPONDENT

17 MS. ANDRIEU: Yes.

18 Mr. Chief Justice, and may it please the
19 Court:

20 The only survivor who could identify the
21 assailant who led the massacre in the small home at 2230
22 North Roman Street was Larry Boatner. He
23 identified Larry -- he identified the Petitioner after
24 having searched the faces of 72 individuals who were
25 presented to him in photo line-ups, one after the other.

1 And yes, Justice Sotomayor, several of the -- of those
2 faces or several of those individuals bore short fade
3 haircuts. And yes, some of the individuals who were
4 pictured in those photo line-ups were other suspects.
5 The record reflects that Mr. Boatner scrutinized those
6 72 faces. At one point line-up 11 was shown to him on
7 March 22nd and he remarked about the haircut. He said:
8 My assailant wore his hair like this --

9 JUSTICE GINSBURG: Does this -- was this
10 line-up, was this after Boatner saw the photograph in
11 the newspapers?

12 MS. ANDRIEU: No, it was not. I believe
13 the -- Mr. Smith's photograph was pictured in the
14 Times-Picayune newspaper on June 7th and this particular
15 line-up was shown to Mr. Boatner on March 22nd. So at
16 that point, line-up eight, he stopped and remarked about
17 the hair.

18 JUSTICE SOTOMAYOR: Could you tell me why
19 Boatner waited 2 weeks to -- or never told the police
20 that the face that he saw in the newspaper was the face
21 of his assailant? I -- I -- as I understand the facts,
22 he says he saw the newspaper, recognized his assailant
23 and remained silent.

24 MS. ANDRIEU: Yes, he did.

25 JUSTICE SOTOMAYOR: It wasn't until they

1 presented him with the line-up including Mr. Smith's
2 face that he identified Mr. Smith. What's the reason
3 for the delay?

4 MS. ANDRIEU: His reason, Your Honor, is --
5 it's contained most specifically on page 191 of the
6 joint appendix, and it is frankly that he was afraid.
7 He obvious -- and I think the jury would have understood
8 that. He obviously knew what Mr. Smith was capable of.
9 He -- I'm sure he feared --

10 JUSTICE SOTOMAYOR: And so what turned --
11 what changed his mind once police showed him the
12 line-up.

13 MS. ANDRIEU: Well, I don't know that he
14 changed his mind, but he was presented with a line-up
15 and when he was presented with a line-up he very quickly
16 identified Juan Smith and said: That is him; I will
17 never forget his face. So --

18 JUSTICE GINSBURG: And that was before or
19 after the picture in the paper?

20 MS. ANDRIEU: That was after. And all of
21 this, by the way, was vetted during -- during a motion
22 to suppress hearing. When the trial judge learned --
23 that the photograph had been shown in the newspaper, he
24 reopened the hearing on the motion to suppress to
25 determine -- and over the State's objection; we argued

1 that this was not State action -- but he reopened the
2 motion to suppress to determine for himself whether or
3 not that newspaper had in any way tainted the later
4 identification of Juan Smith.

5 JUSTICE BREYER: What is this? I mean, I
6 thought -- I may -- I thought the issue is that there
7 were some notes, and the first note, which was made on
8 the day, the policeman says that Boatner said he could
9 not supply a description of the perpetrator, other than
10 to say they were black males. Then he said they had
11 golden teeth and low-cut haircuts.

12 And 5 days later he could not ID anyone
13 because he couldn't see faces. Then he said he'd only
14 glanced at the first man. He couldn't tell if they had
15 their faces covered and didn't see anyone. Then he
16 said: I could not ID, would not know them if I saw
17 them. Then another set of police notes says he said
18 that he could not identify any of the perpetrators of
19 the murder.

20 So I guess those are all notes that the --
21 the prosecution did not give to the defense. So if you
22 were a defense lawyer, whatever this other stuff is, I
23 guess you would have been pretty happy to have those
24 notes, because you might have tried to impeach his
25 identification.

1 MS. ANDRIEU: Yes.

2 JUSTICE BREYER: And so what -- you're
3 saying that I guess it would have made no difference?

4 MS. ANDRIEU: That's correct, Your Honor.

5 JUSTICE BREYER: Then I'd like to hear that,
6 because it seems on its face that it certainly could
7 have made a difference, that if he had those notes that
8 he could have tried to impeach him and said where did
9 this sudden recognition come from.

10 MS. ANDRIEU: And I can appreciate your
11 concern. This Court has held that favorable evidence --
12 this Court has held that favorable evidence which is not
13 material need not be turned over to the defense. And if
14 I could --

15 JUSTICE GINSBURG: How could it not be
16 material? Here is the only eyewitness --

17 MS. ANDRIEU: Yes.

18 JUSTICE GINSBURG: -- and we have
19 inconsistent statements. Are you really urging that the
20 prior statements were immaterial?

21 MS. ANDRIEU: Yes, Your Honor. If I may put
22 them in perspective.

23 Mr. Boatner provided two statements -- I'm
24 sorry. Mr. Boatner provided a statement on the scene,
25 two statements the day of the incident. To a first

1 responding officer who was not Detective Ronquillo, he
2 gave a description and that description was: Heavy
3 built, with a hair with a fade, with a little small top,
4 with a lot of gold in his mouth. That was while he was
5 at the scene.

6 Later, homicide Detective John Ronquillo
7 arrived at the scene and apparently, according to his
8 notes, and, most importantly, according to his
9 post-conviction, testimony, he asked Larry -- he asked
10 Larry Boatner for a description, and Larry Boatner said:
11 I can't give you a description.

12 I'll put them all in perspective and then go
13 back to what Detective Ronquillo and Mr. Boatner had to
14 say about that. But in any case, Mr. Boatner's severe
15 laceration was treated and then he was escorted to the
16 homicide office, where he gave his formal statement.
17 And in that statement -- statement, part of which has
18 been reproduced here by opposing counsel, Mr. Boatner
19 said: I can tell you about the one, the one who put the
20 pistol in my face. He was a black male with a low cut,
21 gold in his mouth. I don't know how many; that's all; I
22 was too scared to look at anybody. All of them had
23 guns, one was an AK; one was a Tec-9; the one who hit me
24 had a chrome automatic. It was big.

25 CHIEF JUSTICE ROBERTS: Well, and you

1 could argue, presumably you did argue, that before the
2 jury, and that would be compelling evidence for the
3 jury. And if you were the defense lawyer you really
4 would like to have that statement where he said: I
5 couldn't identify them.

6 MS. ANDRIEU: You would like to have it, but
7 it's not material because sandwiched between two
8 descriptions -- and he is -- between two descriptions,
9 he says: I can't identify. And taken in --

10 JUSTICE GINSBURG: How does that make it not
11 material? You can argue that it should be given
12 diminished weight, but an inconsistent statement by the
13 only eyewitness seems to me most material and useful to
14 the defense in cross-examining the eyewitness. I really
15 don't understand how you can -- you can argue that the
16 jury shouldn't put much weight on it, because there were
17 these other things; but to say that it's immaterial -- I
18 find that that is -- is not plausible.

19 JUSTICE SCALIA: And not only the only
20 eyewitness but if I understand it correctly the only
21 evidence against the defendant. This was the only
22 evidence against him, this one eyewitness
23 identification, right? Was there anything else?

24 MS. ANDRIEU: There was -- the
25 identification of Juan Smith was bolstered by evidence,

1 by testimony of the brother of Phillip Young, the
2 perpetrator who was left at the scene as an aphasic
3 amnesiac. So he established a link that the two are
4 known to each other, Juan Smith and -- but yes.

5 JUSTICE KENNEDY: But just on the
6 materiality point, I -- I just have to agree with
7 Justice Ginsburg. What you're telling us is that when
8 the defense stands up and said, and isn't it true that
9 in this statement which you've just testified to on
10 direct and which the police have put in on direct, you
11 also said you could not identify any perpetrators of the
12 murder -- and then the prosecutor says immaterial and
13 the judge says strike it.

14 MS. ANDRIEU: But that's not --

15 JUSTICE KENNEDY: I just can't believe that.

16 MS. ANDRIEU: But that's not what he says.
17 He says I can tell you about the one, the one who put
18 the pistol in my face.

19 JUSTICE KENNEDY: I'm talking about the
20 Boatner statement of 3/6/95, in which Boatner told
21 police he could not identify any of the perpetrators of
22 the murder. JA-259/60.

23 MS. ANDRIEU: Yes.

24 JUSTICE KENNEDY: And you say that's
25 immaterial. I find that just incredible.

1 JUSTICE BREYER: Is it that you mean
2 immaterial, or is it that you mean that, that it wasn't
3 prejudicial, because there's so much other evidence,
4 there was no reasonable probability it would have made a
5 difference in the trial?

6 MS. ANDRIEU: That is what I mean, yes.

7 JUSTICE BREYER: Okay. So we can forget the
8 word "material."

9 Now, you're saying there's so much other
10 evidence here against him that it wouldn't have made any
11 difference. I can understand that argument.

12 MS. ANDRIEU: Well, I --

13 JUSTICE BREYER: I don't know if it's right.
14 That is -- that is -- now I think I can go back to
15 Justice Kennedy's question, put it in those terms and
16 say why wouldn't -- this could have made a difference.
17 I mean, here, we have this witness who said all of these
18 great things for your side, and within a space of hours,
19 he has been telling the police that he can't identify
20 anybody, he doesn't know. I mean, what -- that sounds
21 like there is a probability that would have made a
22 difference.

23 Why not?

24 MS. ANDRIEU: The most important evidence in
25 this case is the testimony, or the transcript from

1 post-conviction -- the post-conviction relief hearing.
2 John Ronquillo, whose notes these are, was asked about
3 the March 6 statement, and I guess we are
4 fast-forwarding. The next -- the statement after the
5 statement made -- the one made in the homicide office
6 was made on March 6. So at that time, Detective
7 Ronquillo called Larry Boatner, and Larry Boatner said
8 "I can't identify anyone."

9 And based -- and what Detective Ronquillo
10 had to say about that -- first of all, Larry Boatner
11 didn't remember saying that. But what Detective
12 Ronquillo had to say about it -- and he was the person
13 who was, whose impressions -- about whose impressions we
14 are speaking -- was that at that point, Mr. Boatner,
15 like many murder witnesses, was retreating. Temporarily
16 equivocating, as we wrote in brief -- he was retreating
17 somewhat from his assistance with the police -- police.
18 Not in -- not in an abnormal --

19 JUSTICE SOTOMAYOR: What if --

20 MS. ANDRIEU: Your Honor, can I --

21 JUSTICE SOTOMAYOR: -- what if -- could the
22 jury be entitled to reject that conclusion? They have
23 four statements by this man who Ronquillo described as
24 very coherent, very with it at the scene of the crime.
25 Would a jury be entitled to -- to reject that excuse by

1 Ronquillo?

2 MS. ANDRIEU: They would, Your Honor.

3 And --

4 JUSTICE SOTOMAYOR: And if they were
5 entitled to do that, why would the absence of four
6 statements that I can't identify someone not have been
7 an argument that defense counsel could have used, number
8 one, and that have a reasonable probability of making a
9 difference?

10 MS. ANDRIEU: First of all, there were not
11 four statements that were made where Boatner said he
12 couldn't identify anyone -- again. He gave two
13 statements the day of where he described, and one
14 statement --

15 JUSTICE SOTOMAYOR: At different hours.

16 MS. ANDRIEU: I'm sorry?

17 JUSTICE SOTOMAYOR: At different hours.

18 MS. ANDRIEU: Yes.

19 JUSTICE SOTOMAYOR: And to different
20 officers.

21 MS. ANDRIEU: Yes.

22 JUSTICE SOTOMAYOR: So that's two
23 statements. My math is wrong?

24 MS. ANDRIEU: I'm sorry. Those were
25 statements where he inculcated the Defendant. There

1 were two statements -- starting on the scene, there is a
2 statement provided to the first responding officer where
3 he provides a description. Larry Boatner provides a
4 description --

5 JUSTICE GINSBURG: But there is a
6 description that other -- other suspects fit. The
7 close-cut hair, the gold teeth. That didn't identify
8 Smith, as opposed to the other folks who had those same
9 characteristics.

10 MS. ANDRIEU: Yes. And -- and those other
11 suspects' photographs were all contained -- were
12 contained in photo IDs, photo lineups, and Mr. Boatner
13 never selected one of them.

14 The other thing is he -- gold teeth. He
15 knew that his perpetrator had gold teeth. The next time
16 he saw Mr. Smith was at trial in court. Mr. Smith
17 revealed his teeth, and he had gold teeth. But as far
18 as the other suspects having the haircut or physical --
19 similar physical attributes --

20 JUSTICE GINSBURG: In -- in terms of prior
21 inconsistent statements, and we can argue about whether
22 there were more consistent statements than inconsistent
23 statements -- to say that this was not Brady material,
24 because what -- we are not saying that Larry Boatner
25 made up a story on the stand that doesn't -- didn't

1 conform to the truth. The question is should the
2 prosecutor, should the defense attorney, have access to
3 a prior inconsistent statement?

4 MS. ANDRIEU: And this Court has said that
5 Brady is a reflective -- is a reflective analysis. He
6 did not --

7 JUSTICE ALITO: Could you explain how
8 this -- how this took place? You have a case in which
9 you're -- you're relying almost entirely on the
10 testimony of one witness, and you have these notes that
11 were taken by, and are presumably in the possession of
12 the lead investigator. Wouldn't any prosecutor ask the
13 -- the lead -- the lead investigator; do you have any
14 statements of this witness?

15 MS. ANDRIEU: Absolutely.

16 JUSTICE ALITO: They have to be examined,
17 and if there's anything in them that's -- that is
18 impeachable material, they have to be turned over to the
19 defense. And under Louisiana laws, is there are a rule
20 that requires the turning over of statements by
21 witnesses, prior statements by witnesses?

22 MS. ANDRIEU: Under Louisiana law, prior --
23 statements of witnesses are not discoverable. But of
24 course, under this Court's decision in Brady v.
25 Maryland, if the prosecutor makes a determination that

1 they would materially affect the outcome of --

2 JUSTICE SOTOMAYOR: But you have -- you have
3 to supply statements by a witness when they take the
4 stand, don't you? Those are immaterial? Don't you have
5 to turn over --

6 MS. ANDRIEU: No.

7 JUSTICE SOTOMAYOR: -- not in the State of
8 Louisiana? You don't have to turn over witness
9 statements when they are taking the stand?

10 MS. ANDRIEU: No. And these statements were
11 provided in camera. Defense filed a motion for
12 discovery, and he asked for Brady material. He asked
13 specifically for the supplemental report, which is where
14 these statements are contained.

15 JUSTICE SOTOMAYOR: So you are -- so are you
16 claiming that the judge's failure to catch these
17 inconsistencies excuses your Brady obligation?

18 MS. ANDRIEU: Not at all. The Brady
19 obligation is ours. In fact, we believe that that's
20 actually a poor practice. But in --

21 JUSTICE KAGAN: Ms. Andrieu, if I could go
22 back to Justice Alito's question, was the problem here
23 that the prosecutors never received these statements
24 from the police officers, or did the prosecutors make a
25 determination similar to the kind of arguments that

1 you're making today -- make a determination that these
2 statements simply should not be turned over because they
3 are not material?

4 MS. ANDRIEU: The prosecutor in this case
5 actually turned them over to the trial court for an in
6 camera inspection. And articles -- Louisiana Code of
7 Criminal Procedure Article 718 actually provides for
8 that practice --

9 JUSTICE BREYER: It's so odd that -- I mean
10 look, it seems like here it is, 5 days after the
11 shooting and well before, I guess, that this witness saw
12 any mugshots or did anything. And he says I could not
13 identify anyone because he couldn't see the faces of the
14 people. And now you're saying later, which you
15 introduce into trial, his having looked at the faces of
16 the people and identifying them from their faces -- now
17 previously, he said he couldn't see their faces. And in
18 Louisiana, the State of Louisiana, the prosecution and
19 the judges say that isn't -- you don't have to turn over
20 that statement that he couldn't see the faces made
21 earlier.

22 MS. ANDRIEU: No, what he --

23 JUSTICE BREYER: What?

24 MS. ANDRIEU: I'm sorry. When he's saying
25 that he could not see the faces, he is not referring to

1 Juan Smith. He and -- Detective Ronquillo testified at
2 post-conviction that he always said he could identify
3 the one, the one whose face appeared a handgun's length
4 from his own, unmasked, when he opened that front door
5 at 2230 North Roman.

6 Detective Ronquillo put this in perspective
7 at post-conviction. And as I said --

8 JUSTICE BREYER: You know, all these -- all
9 these statements that we have here, you're saying, all
10 referred to people other than the Defendant.

11 MS. ANDRIEU: Juan. Yes.

12 JUSTICE BREYER: All right. Well, was there
13 a finding on that?

14 MS. ANDRIEU: There was -- the judge did not
15 give express findings of fact or finding of law, but --

16 JUSTICE BREYER: Perhaps the defense would
17 have liked to say they did apply to the Defendant.

18 JUSTICE SCALIA: You don't say "all of
19 them." All of them? Didn't apply to the --

20 MS. ANDRIEU: Yes. The one at the scene
21 when he says "I can't describe anyone" here.

22 JUSTICE SCALIA: This was not -- that
23 applied to everyone, right?

24 MS. ANDRIEU: I'm sorry?

25 JUSTICE SCALIA: The one at the scene

1 applied to everyone.

2 MS. ANDRIEU: To everyone.

3 JUSTICE SCALIA: "Can't identify anyone."

4 MS. ANDRIEU: March 6 applied to everyone --
5 everyone except Juan Smith.

6 JUSTICE SCALIA: Okay. So you're
7 bringing --

8 CHIEF JUSTICE ROBERTS: I'm sorry. You've
9 lost me there. But he says "I can't identify anyone,"
10 Smith is out of that group already?

11 MS. ANDRIEU: Oh, I'm sorry. No. He's --

12 CHIEF JUSTICE ROBERTS: Okay.

13 MS. ANDRIEU: I'm sorry. In both
14 circumstances, he is saying -- the first time he is
15 saying I can't describe. The second time he is saying I
16 can't help you; I can't identify everyone. But the jury
17 was --

18 JUSTICE BREYER: You say like --

19 CHIEF JUSTICE ROBERTS: Excuse me. I can't
20 identify everyone or everyone?

21 MS. ANDRIEU: Anyone. And really, what
22 it --

23 JUSTICE BREYER: He says, "I can't identify
24 anyone because I couldn't see faces." Okay? That's
25 what it says here, at least in my notes that my law

1 clerks gathered.

2 (Laughter.)

3 JUSTICE BREYER: All right, and my point is,
4 then this seems very odd, I mean really unusual that in
5 the State of Louisiana that they have some kind of
6 system that doesn't turn that statement over to the
7 defense.

8 MS. ANDRIEU: It was turned over to the
9 judge under Article 718 for in-camera inspection.

10 JUSTICE ALITO: Where is that reflected in
11 the record? I --

12 MS. ANDRIEU: That's on October 31st of
13 1995. There is a hearing.

14 JUSTICE ALITO: What you said in your brief
15 was that the judge determined that the supplemental
16 report relating to the North Roman Street murders
17 contains no Brady material.

18 MS. ANDRIEU: Yes. Mr. Smith --

19 JUSTICE ALITO: I didn't understand the
20 record to be that all of Boatner's statements, that all
21 the statements of Boatner that we are concerned about
22 now were examined by the judge before--

23 MS. ANDRIEU: Yes.

24 JUSTICE ALITO: Before trial?

25 MS. ANDRIEU: Yes.

1 JUSTICE ALITO: And the record reflects that
2 in where?

3 MS. ANDRIEU: The transcript of October
4 31st, 1995.

5 JUSTICE KAGAN: Is it the view of the
6 prosecutor's office that because those materials were
7 turned over to the judge, assuming that they were turned
8 over to the judge, that that obviates the Brady
9 obligation? Is that the view of the prosecutor's
10 office?

11 MS. ANDRIEU: Not at all. We believe it's a
12 bad practice. But it is --

13 JUSTICE KENNEDY: Did you concede there was
14 a Brady violation in this case?

15 MS. ANDRIEU: Did we concede?

16 JUSTICE KENNEDY: Do you now concede--

17 MS. ANDRIEU: No.

18 JUSTICE KENNEDY: --there was a Brady
19 violation in the case?

20 MS. ANDRIEU: No.

21 JUSTICE KENNEDY: Your telling the Court
22 that this should have been kept from the defense, all of
23 it?

24 MS. ANDRIEU: Under this--

25 JUSTICE KENNEDY: Under Brady.

1 MS. ANDRIEU: --Court's decision in Kyles, I
2 believe a prudent prosecutor would have disclosed it.

3 JUSTICE GINSBURG: But Kyles is a decision
4 saying what the prosecutor must disclose, not: It's a
5 good practice.

6 MS. ANDRIEU: No. But --

7 JUSTICE SOTOMAYOR: So is there a violation
8 under our holding in Kyles?

9 MS. ANDRIEU: I'm sorry.

10 JUSTICE SOTOMAYOR: Is there a Brady
11 violation under our holding in Kyles?

12 MS. ANDRIEU: No, there is not.

13 JUSTICE SOTOMAYOR: So explain why what is
14 on its face seemingly inconsistent statements are not
15 required to be turned over.

16 MS. ANDRIEU: With regard to the March 6
17 statement where Larry Boatner tells John Ronquillo at
18 that point: I can't tell anyone, what Mr. -- Detective
19 Ronquillo had to say about that is dispositive. And he
20 said: At that point Larry Boatner was withdrawing from
21 -- he was afraid -- he was withdrawing from police
22 assistance.

23 JUSTICE SOTOMAYOR: I don't understand how
24 he becomes the arbiter of what's Brady. You said to me
25 earlier that a jury would be entitled to reject his

1 conclusion. All right. Tell me what -- how his
2 conclusion makes it non-Brady if a juror could decide
3 differently.

4 MS. ANDRIEU: The post -- the post-
5 conviction testimony is pivotal because there is a
6 petition that's filed with attachments, with exhibits.
7 That is what gets, and that is what got Mr. Smith his
8 day in court, his four-day post- conviction hearing
9 testimony -- post conviction- hearing. Larry Boatner
10 took the stand. What Larry Boatner had to say and what
11 John Ronquillo had to say -- because after all, these
12 are John Ronquillo's notes, I think they are important.
13 And I think they're important in a Brady analysis
14 because when you go through --

15 JUSTICE SOTOMAYOR: The two components to
16 Brady, should they have been turned over? And if they
17 had, is there a reasonable probability of a different
18 outcome?

19 MS. ANDRIEU: There is not.

20 JUSTICE SOTOMAYOR: Should they have been
21 turned over? That's the question that I think my
22 colleague asked you, and you're saying no.

23 MS. ANDRIEU: No. I believe that a prudent
24 prosecutor would have. I believe we are tacking a
25 little bit too close to the wind, but a prudent

1 prosecutor would have. I also think that --

2 JUSTICE SOTOMAYOR: All right, now
3 articulate what legal theory --

4 MS. ANDRIEU: Because --

5 JUSTICE SOTOMAYOR: -- would say these are
6 not, these are not materials that needed to be turned
7 over, when they say "could not ID; would not know them
8 if I saw them; can't tell if had faces covered; didn't
9 see anyone." That's one of the notes. The other one,
10 "I don't know how many that I saw; I was too scared to
11 look at anybody." And --

12 What makes any of those statements --

13 MS. ANDRIEU: If Mr. Boatner could not
14 identify anyone, Mr. Boatner would not have viewed 15
15 lineups. When the lineups were presented to him --

16 JUSTICE SOTOMAYOR: This is all the jury
17 argument. Tell me why they didn't on their face
18 constitute Brady materials that needed to be turned
19 over. What's the legal principle that doesn't make them
20 Brady?

21 MS. ANDRIEU: Because if they had been
22 presented -- if those statements had been presented to
23 defense -- presented to a jury, the out -- the outcome
24 would have remained the same. The jury --

25 JUSTICE GINSBURG: How do you know? How do

1 you know? How can you possibly know? The jury is
2 supposed to decide on the credibility of this witness.
3 There is a statement that he made it -- a prior
4 inconsistent statement. The -- Mr. Shanmugam outlined
5 five categories of what he called Brady materials.
6 Is -- are you maintaining that none of those categories,
7 that there was no Brady material at all in this case?

8 MS. ANDRIEU: Yes. You are speaking of the
9 other pieces of evidence?

10 JUSTICE GINSBURG: Yes.

11 MS. ANDRIEU: Yes. Well, I'm -- I'm not
12 sure if the Charity Hospital's medical records of
13 Mr. Boatner are still being urged to this Court --

14 JUSTICE GINSBURG: I'm talking about Mims
15 and -- what was the woman's name? Russell?

16 MS. ANDRIEU: Shaelita Russell.

17 JUSTICE GINSBURG: And Young and the snitch,
18 the one who said that -- his cellmate told him -- his
19 cellmate was the perpetrator.

20 MS. ANDRIEU: Well, to be clear, Ms. Russell
21 never made a dying declaration. What the defense is
22 presenting to this Court as evidence of a dying
23 declaration are words and dashes of Detective Ronquillo,
24 written at some point where he --

25 JUSTICE GINSBURG: Was it a determination by

1 the judge that it wasn't a dying declaration?

2 MS. ANDRIEU: The judge again did not make
3 specific facts of finding or loss. The judge -- I'm
4 sorry.

5 JUSTICE KENNEDY: Because it was not --
6 because it was not turned over. And with all respect, I
7 think you misspoke when you -- when you were asked what
8 is -- what is the test for when Brady material must be
9 turned over. And you said whether or not there is a
10 reasonable probability -- reasonable likelihood; pardon
11 me -- a reasonable probability that the result would
12 have been different. That's the test for when there has
13 been a Brady violation. You don't determine your Brady
14 obligation by the test of a Brady violation. You're
15 transposing two very different things.

16 And so that's incorrect.

17 MS. ANDRIEU: And I'm sorry, Justice
18 Ginsburg, your -- Shaelita Russell did not give a dying
19 declaration.

20 JUDGE GINSBURG: All right. Let's go to
21 Mims, who says, "I saw them" -- "I saw the perpetrators
22 go to their car when they were exiting. They had ski
23 masks."

24 MS. ANDRIEU: And that information -- Dale
25 Mims testified at post-conviction. He testified he did

1 not see the assailants arrive. He did not see them --

2 JUSTICE GINSBURG: But isn't it most

3 unlikely as your -- as what Mr. Shanmugam said, that

4 robbers -- I mean, the people who are entering,

5 intruding on another's premises to rob or whatever else

6 they wanted to do, would wear masks going out but not

7 going in? I mean, they don't want anybody -- they don't

8 want anybody to be able to identify them.

9 MS. ANDRIEU: And it's plausible that

10 Mr. Boatner -- I'm sorry -- that Mr. Smith masked

11 himself upon escape after --

12 JUSTICE GINSBURG: But is that maybe --

13 CHIEF JUSTICE ROBERTS: I thought -- I'm

14 sorry. I thought the idea was they were going to kill

15 everybody who might have seen them inside. Their only

16 worry would be someone who would see them outside,

17 right?

18 MS. ANDRIEU: Yes. So worried that the car

19 that they arrived in had no license plate. They were

20 definitely looking not to be identified.

21 JUSTICE KAGAN: Ms. Andrieu, did your office

22 ever consider just confessing error in this case?

23 MS. ANDRIEU: I'm sorry?

24 JUSTICE KAGAN: Did your office ever

25 consider just confessing error in this case? You've had

1 a bunch of time to think about it. Do you know? We
2 took cert a while ago. I'm just wondering whether
3 you've ever considered confessing error.

4 MS. ANDRIEU: Your Honor, we believe that we
5 have an -- an argument that these statements of Larry
6 Boatner are not material. The other evidence that
7 Mr. Shanmugam has put before this Court were either not
8 suppressed or not favorable. The statement -- Larry
9 Boatner gave several -- he did describe Juan Smith. He
10 described him on several occasions, and he ultimately
11 identified him, and he identified him after scrupulously
12 viewing 15 -- 13 lineups.

13 So the suggestion that he said at one point,
14 because he is equivocating, because his name is on --
15 his name, address, contact information are on the police
16 report. It is not a surprise -- and I don't think it
17 would be a surprise to Orleans Parish jurors -- to find
18 that early in an investigation, a murder witness
19 equivocates, which is something --

20 JUSTICE GINSBURG: But you're taking that
21 judgment away from the jury. There was a prior
22 inconsistent statement. Shouldn't that be the end of
23 it? A -- a prior inconsistent statement, one that is
24 favorable to the defense, has to be turned over, period.
25 That's what I thought was -- what Brady requires.

1 MS. ANDRIEU: And in this case --

2 JUSTICE SCALIA: I -- may I suggest that --

3 MS. ANDRIEU: Yes.

4 JUSTICE SCALIA: -- you -- you stop fighting
5 as to whether it should be turned over? Of course it
6 should have been turned over. I think the case you're
7 making is that it wouldn't have made a difference.

8 MS. ANDRIEU: Made a difference. Yes.

9 JUSTICE SCALIA: And -- and that's a closer
10 case, perhaps, but surely it should have been turned
11 over. Why don't you give that up?

12 MS. ANDRIEU: Well, I -- and I actually
13 thought I had when I said a prudent prosecutor would,
14 but in making a sort of over-the-shoulder, rear window
15 Brady analysis, I don't think that these statements --
16 that the statements made to -- the statement made to
17 Ronquillo at the scene where he is all shook up and he
18 says, I can't describe anybody. Then he goes to the
19 hospital gets his severe laceration taken care of --

20 JUSTICE SOTOMAYOR: Counsel, my worry is the
21 following. You've read Cullen --

22 MS. ANDRIEU: I'm sorry?

23 JUSTICE SOTOMAYOR: You read Cullen.

24 MS. ANDRIEU: Yes.

25 JUSTICE SOTOMAYOR: You read the dissent in

1 Cullen. There has been serious accusations against the
2 practices of your office, not yours in particular but
3 prior ones. It is disconcerting to me that when I asked
4 you the question directly should this material have been
5 turned over, you gave an absolute no. It didn't need to
6 be. It would have been prudent, but it didn't need to
7 be. That's really troubling.

8 MS. ANDRIEU: And I think I misunderstood
9 your question -- I think I misunderstood your question.
10 Should it have been turned over? Yes. No you that we
11 are here 16 years later, and the Court --

12 JUSTICE SOTOMAYOR: That's the second prong
13 of Brady. I said there were two prongs to Brady. Do
14 you have to turn it over, and second, does it cause
15 harm. And the first one you said not. That -- it is
16 somewhat disconcerting that your office is still
17 answering equivocally on a basic obligation as one that
18 requires you to have turned these materials over --

19 MS. ANDRIEU: Your Honor --

20 JUSTICE SOTOMAYOR: -- whether it caused
21 harm or not.

22 MS. ANDRIEU: If -- if I may explain, I
23 obviously misunderstood your question. Present day
24 prosecutors -- or, I'm sorry. May I --

25 CHIEF JUSTICE ROBERTS: You can, very

1 briefly.

2 MS. ANDRIEU: We would have -- today we turn
3 all of this over. Our only concern is redacting victim
4 information, identifying information so that -- for
5 victims' safety. But it -- it should have been turned
6 over. I guess what I was addressing or attempting to
7 address was the materiality prong of Brady.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 MS. ANDRIEU: Thank you.

10 CHIEF JUSTICE ROBERTS: Mr. Shanmugam, 4
11 minutes.

12 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

13 ON BEHALF OF THE PETITIONER

14 MR. SHANMUGAM: Thank you, Mr. Chief
15 Justice.

16 Just three very quick points. First of all
17 with regard to Larry Boatner's statements on March the
18 6th, Justice Breyer, you'll be happy to note that your
19 law clerk's notes were correct. Boatner on March the
20 6th said, and this is at page 308 of the joint appendix,
21 could not ID anyone because couldn't see faces; can't
22 tell if had faces covered; didn't see anyone; would not
23 know them if I saw them.

24 JUSTICE BREYER: I'm not surprised they are
25 correct.

1 (Laughter.)

2 MR. SHANMUGAM: It is quite clear that that
3 statement applies to all of the perpetrators. The State
4 advances the argument today, as it did in its brief,
5 that Boatner must have been too scared to cooperate by
6 March the 6th, but that is utterly belied by the record
7 in this case. Boatner continued to cooperate with the
8 police investigation in the following weeks reviewing
9 police line-ups. He even testified that he wanted to go
10 looking for Petitioner after seeing his photograph in
11 the New Orleans newspaper, pages 489 and 494 of the
12 joint appendix.

13 He didn't leave New Orleans until June, 3
14 months later, and he actually returned to New Orleans
15 before Petitioner was even apprehended, so again --

16 JUSTICE ALITO: It is your understanding
17 that the -- that all of Boatner's, all the notes about
18 Boatner's statements were turned over to the judge
19 before trial for in camera inspection?

20 MR. SHANMUGAM: Justice Alito, it is
21 entirely unclear based on this record. Counsel for
22 Respondent cites the transcript from October 31st, 1995,
23 a transcript that wasn't even prepared until after cert
24 was granted in this case.

25 It's clear that the court reviewed

1 something, but it is entirely unclear from that
2 transcript what the court reviewed; and of course, even
3 if the court had made an in camera determination it
4 would no way -- in no way affect our claim after the
5 fact here.

6 My second point: The State today for the
7 first time says in response to the question from Justice
8 Scalia that there was more evidence here linking
9 Petitioner to the crime and relies on the testimony of
10 Eddie Young, the brother of Phillip Young, the
11 individual who was found at the scene. But the sole
12 substance of that testimony was that Phillip Young knew
13 Petitioner, and we would respectfully submit that that
14 is scarcely inculpatory, and if it was, anyone in New
15 Orleans who knows a felon ought to be worried; and
16 therefore we really don't think that that adds anything
17 to the evidence in this case. The sole evidence linking
18 Petitioner to the crime was the statement -- the
19 testimony of Larry Boatner.

20 Third, there has been some discussion about
21 the language in this Court's cases in Kyles and Agurs
22 suggesting that prosecutors should err on the side of
23 caution. That is part of the constitutional standard
24 because after all, the materiality requirement is part
25 of the requirement for a constitutional violation under

1 Brady. But all of the evidence at issue here including
2 Boatner's statements was withheld from the defense,
3 leaving aside this question of what the trial court may
4 have reviewed in camera.

5 And the prosecutor's conduct in this case,
6 with all due respect to Ms. Andrieu, was not, quote, "a
7 little too close to the wind." The Orleans Parish
8 district attorney's office acted with flagrant disregard
9 for its obligations under Brady in this case. The Brady
10 standard has been around for half a century.

11 There is no real ambiguity about what that
12 standard requires, and we think that the conduct in this
13 case was in fact egregious and clearly violated that
14 standard. We think that the trial court erred by
15 rejecting Petitioner's Brady claim and for that reason
16 we think that its judgment should be reversed.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel,
19 counsel.

20 The case is submitted.

21 (Whereupon, at 12:12 p.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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